

# INTERVIEWING LAWYERS: A CRITICAL SELF-REFLECTION ON EXPERT INTERVIEWS AS A METHOD OF EU LEGAL RESEARCH

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*Interviews are commonly used as a research method in social and political science, where they are considered an effective means to elicit information on political and social behaviour. Interviews are less frequently used in legal research outside characteristically 'socio-legal' or 'empirical legal' research, which is a type of legal research that relies on qualitative or quantitative methods. Drawing on the authors' own experiences from conducting and using interviews with legal professionals as a source of legal research in the context of EU law, this article offers both a theoretical contribution and some practical insights. Theoretically, it builds on the existing literature on 'expert' interviews by examining lawyer interviews as a particular form of 'expert' investigations. We argue that interviews with lawyers pose particular challenges, which have been ignored and overlooked in general discussions on expert interviews. These challenges relate to access, confidentiality and control of research data, each of which is discussed in detail.*

**Keywords:** EU law, empirical research, interviews, experts, lawyers

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## I. INTRODUCTION

Interviews are commonly used as a research method in social and political science, where they are considered an effective means to elicit information on political and social behaviour.<sup>1</sup> They are much less used in legal research outside of characteristically 'socio-legal' or 'empirical legal' research, which is a type of legal research that relies on qualitative or quantitative methods.<sup>2</sup> The narrative is a familiar one. Legal research, especially its doctrinal variant, has traditionally dealt with, and given priority to, normative material and written sources that are legally binding and enforceable in courts. The famous Nuffield report, taking stock of the state of empirical legal research in the UK, summarised over a decade ago that 'legal scholarship tends to be law-centred, conducted by lone researchers undertaking close textual analysis of legal material'.<sup>3</sup> Legal scholarship's focus on normative material has also manifested itself in the apparent reluctance of legal scholars to 'use non-legal documents as sources of data'.<sup>4</sup>

Preference for doctrinal research is not the only explanation for the normative imprisonment of legal scholarship. Lawyers receive little, if any, formal training in the use of empirical research methods and generally engage with questions of research methodology during their studies only to a limited extent. Doctrinal research has been the research methodology used most

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<sup>1</sup> Stefanie Bailer, 'Interviews and Surveys in Legislative Research' in Shane Martin, Thomas Saalfeld, and Kaare W Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014).

<sup>2</sup> See, eg, Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010); John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003); Paddy Hillyard, 'Law's Empire: Socio-Legal Empirical Research in the Twenty-First Century' (2007) 34 *Journal of Law and Society* 269, 270.

<sup>3</sup> Dame Hazel Genn, Martin Partington and Sally Wheeler, 'Law in the Real World: Improving Our Understanding of How Law Works' (2006) The Nuffield Inquiry on Empirical Legal Research 4 <[www.nuffieldfoundation.org/sites/default/files/Law%20in%20the%20Real%20World%20full%20report.pdf](http://www.nuffieldfoundation.org/sites/default/files/Law%20in%20the%20Real%20World%20full%20report.pdf)> accessed 11 September 2017. The Nuffield report defined empirical legal research as 'the study through direct methods of the operation and impact of law and legal processes in society'.

<sup>4</sup> Webley (n 2) 938.

widely in European law faculties, where law students have traditionally been taught to view law as a closed system, and instruction has closely reflected traditional concepts of legal (judicial) reasoning. This is not a particularly European problem, but a characteristic of legal education more globally. In the US, two academics (both educated in political science and law) conducted a study of several hundred law articles using empirical research methods. They concluded that 'the current state of empirical legal scholarship is deeply flawed',<sup>5</sup> pointing out deficits in the methodology and analysis and identifying these as skills that should be introduced to students entering law faculties. Finally, legal scholars have also been hindered by the absence of a critical mass engaging with empirical research, although scepticism towards socio-legal research is slowly diminishing as a response to better material resources, as well as increased funding to interdisciplinary research that uses empirical research methods.<sup>6</sup>

Persistent, but diminishing scepticism also applies to EU legal research, which forms the core of our research. EU legal scholarship could in principle provide a welcoming environment for those interested in deploying empirical methods. It has traditionally adopted a less normative outlook than many national research traditions, and embraced law in its broader political, social and cultural contexts. Thus, empirical legal research enjoys more prestige in EU law than in national legal research.<sup>7</sup> At the same time, the 'instrumentalisation' of law – reflected in the slogans about the pivotal role of law as a key tool in furthering European integration – has been embraced by

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<sup>5</sup> Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *University of Chicago Law Review* 6.

<sup>6</sup> For expectations of funding bodies at the EU level, see e.g. ALLEA, 'Embedding the Social Sciences and Humanities in Horizon 2020', <[http://www.allea.org/wp-content/uploads/2015/09/2013-02-28-ALLEA-Roadmap-on-Embedding-SSH-in-Horizon-2020\\_final.pdf](http://www.allea.org/wp-content/uploads/2015/09/2013-02-28-ALLEA-Roadmap-on-Embedding-SSH-in-Horizon-2020_final.pdf)> accessed 11 September 2017. See also Science Europe's position paper where it was argued that 'A key to future scientific breakthroughs lies in interdisciplinary research', in Science Europe, 'Science Europe Position Statement Horizon 2020: Excellence Counts December 2012', 4 <[www.scienceeurope.org/wp-content/uploads/2014/05/SE\\_H2020\\_Excellence\\_Counts\\_FIN.pdf](http://www.scienceeurope.org/wp-content/uploads/2014/05/SE_H2020_Excellence_Counts_FIN.pdf)> accessed 11 September 2017. See generally also Hans-W Micklitz and Rob van Gestel, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292.

<sup>7</sup> Gráinne de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 2 *Journal of European Public Policy* 310.

EU lawyers, which could contribute to making the area even more attractive for empirical research.<sup>8</sup> Many research questions relating to various aspects of the role of law in resolving societal conflicts in the various areas of EU law necessitate empirical research. However, drawing on their years of experience in doctoral supervision, Hans-W Micklitz and Rob van Gestel establish that the PhD proposals that they have come across are largely policy-driven and overwhelmingly concerned with societal relevance. They note that,

what is striking in most of the research proposals that we have studied in our methodology seminars over the last five years is the strong emphasis on issues concerning effectiveness, efficiency, impact, influence and so on, whereas usually these criteria are not operationalised, and *few of the proposals explicitly mention socio-legal or empirical-legal research methods*.<sup>9</sup>

The criticism expressed by these two authors does not seem to relate to the change in emphasis, but rather to the attempt to answer new questions concerning effectiveness, efficiency, impact, and so on, by utilising 'traditional' research methods, which seem ill-equipped for the task. They criticise especially the rise in popularity of 'case study' research that proceeds without rooting the relevant cases firmly in empirical methods. Without the counter-examples and agenda-upsetting factors of socio-legal research, there is a good chance that case studies could easily become a tool to entrench status quo practices. Those using empirical methods are not spared criticism from Micklitz and van Gestel, who claim that 'the most empirical-legal research projects concentrate on measuring legal consequences without being able to prove that the consequences are the direct result of the intervention or the changes in the legal regime'.<sup>10</sup> These concerns, together with the practice of EU and national research bodies to award funding to interdisciplinary research, emphasise the importance of exploring the use of empirical methods in EU scholarship.<sup>11</sup>

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<sup>8</sup> On the connection between instrumentalisation and empirical research, see Baldwin and Davis (n 2) 885.

<sup>9</sup> Micklitz and van Gestel (n 6) 301–302 (emphasis added).

<sup>10</sup> Ibid 303.

<sup>11</sup> See n 6.

The purpose of this article is not to provide yet another theoretical overview of research methods in law.<sup>12</sup> Neither is it intended, as a hands-on guide, to those interested in or contemplating using 'alternative' legal research methods. Rather, it is a mix of both, offering a theoretical contribution, as well as some practical insights which stem from our own experiences. Our on-going and completed research projects include approximately 150 semi-structured interviews, half of which have so far been undertaken.<sup>13</sup> The projects involve the utilisation of multiple methods, with interviews forming one relevant data collection technique. Some of the data have already been used in publications.<sup>14</sup> The scope of this article is, nevertheless, limited in two respects. First, it is concerned only with interviews, leaving other types of qualitative research methods, such as small-scale surveys or action research,<sup>15</sup>

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<sup>12</sup> In addition to literature already referred to, see Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013); Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005); Robert Lawless, Jennifer Robbennolt and Thomas Ulen, *Empirical Methods in Law* (Aspen Publishers 2010); Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press 2009); Special Research Issue, 'Law's Reality: Case Studies in Empirical Research on Law' (2009) 35 *Journal of Law and Society*.

<sup>13</sup> Academy of Finland projects in a chronological order: Korkea-aho (2013–2016): The politics of super laws: How third country actors shape the emergence and development of EU law, decision number 267302; Leino-Sandberg (2015–2020): The necessary evil – law, power and institutional politics in the European Union, decision number 307542; Korkea-aho (2016–2021): The Lobbyist? A Socio-Legal Inquiry of Interest Representation in the EU, decision number 306973 and Leino-Sandberg (2017–2021): Transparency in the EU – from reaction to a manifesto?, decision number 309305. Moreover, we are involved in Jean Monnet Network 'European Network on Soft Law Research' (2016–2019), decision number 2016-2397.

<sup>14</sup> See, eg, Päivi Leino, 'Competence as a framework of argumentation' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future* (Hart Publishing 2017), and Deirdre Curtin and Päivi Leino, 'In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn' (2017) 54 *Common Market Law Review* 1673.

<sup>15</sup> Action research is, however, something that we also engage with. In the project plan for Leino-Sandberg's transparency project, it is described as follows: 'researchers will map, and where relevant, try to influence institutional practices. They will seek actively access to documents needed for their substantive research, and when necessary, initiate and participate in administrative and judicial proceedings. In

aside. Second, our analysis is limited to interviews with 'lawyers', by which we refer to those who have received legal education irrespective of whether or not they have remained in the legal profession or engaged in other occupations.

Two reasons justify limiting the scope of this contribution to interviews with lawyers. On the one hand, the existing research that is undertaken with the help of interviews is nearly exclusively concerned with judges, while other legal actors have been overlooked and remain understudied.<sup>16</sup> We have, on the other hand, personally administered dozens of interviews with both lawyers and non-lawyers in our research projects. In the light of these experiences, as well as during the preliminary analysis of the data, we have observed that interviews with lawyers pose particular challenges that are not sufficiently addressed in the empirical research literature. These can be defined as questions relating to *access*, *confidentiality*, and *control of the research process and data*. We address the issue of interviewing lawyers in this article by using examples from our empirical investigations, which gives us the opportunity to engage in methodological self-reflection. Theoretically, it builds on the existing literature on 'expert' interviews by examining lawyer interviews as a particular form of 'expert' investigation. We define 'experts' as people who have specialised knowledge and who can control or facilitate access to other people or institutions; and we define 'expert interviews' as interviews that are conducted with these experts.

Studies of a similar kind have previously been undertaken in national contexts.<sup>17</sup> Studying international law from the point of view of international lawyers and as a particular field of expertise has recently figured on the academic agenda, but to our knowledge these studies have built less on empirical work and more on personal accounts of legal advisors working in

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addition to the substance of the document, the project researchers also analyse the practice of handling these requests and the normative framework that the institution relies on. In this respect, the method resembles earlier methods of participatory action research used in social sciences.'

<sup>16</sup> See Section II 'Empirical Research in EU Law: An Overview'.

<sup>17</sup> See in particular in the French context, Bruno Latour, *The Making of Law. An Ethnography of the Conseil d'État* (Polity 2010).



the field.<sup>18</sup> Many of these studies have been conducted by researchers affiliated with critical approaches to international law, whose focus is often on the exercise of power, the positioning of expertise in international legal debates and the identification of power relationships.<sup>19</sup> These considerations have also informed the development of our respective research agendas.

The article first describes a selection of works based on interview research in the area of EU law. It then offers a brief overview of the literature on expert interviews and explains how interviews with experts are conducted. Section 4 focuses on particular challenges that are raised as regards lawyer interviewees. The article concludes by offering lessons learned and presenting tools for addressing the challenges posed by interviews in future legal research.

## II. EMPIRICAL RESEARCH IN EU LAW: AN OVERVIEW

The roots of empirical legal research are in the gap between legal texts and the day-to-day reality of legal practice.<sup>20</sup> Academics embarking on empirical legal research who have surveyed, for instance, the operation of the civil justice system have been strongly influenced by the alleged gap, giving the emerging research tradition a distinct flavour and a strong critical edge. The central message of empirically-oriented research can be summarised by the slogan 'all is not what it seems in the law books'. Second, its research subjects have been what could generally be described as 'consumers' or 'end-users' of legal services, such as clients of divorce attorneys, crime victims, users of alternative dispute resolution mechanisms, and so on. Finally, empirical research has typically been interested in lower-level processes, such as practices of desk officers in administration, which are usually hidden from research focusing on what goes on officially.<sup>21</sup> The question one might ask is

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<sup>18</sup> See eg *Collection of Essays by Legal advisers of States, Legal Advisers of International Organizations and Practitioners in the Field* (United Nations 1999) and David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

<sup>19</sup> See, for instance, David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton University Press 2004) particularly pages 111–146.

<sup>20</sup> Baldwin and Davis (n 2) 886.

<sup>21</sup> Ibid 887.

whether these features continue to apply to empirical legal research in general, or empirical legal research in EU law in particular?

This section presents an overview of both books published in EU legal scholarship in recent years, as well as articles published in the following major English-speaking refereed journals: *Common Market Law Review* (CMLRev), *European Law Journal* (ELJ), and *European Law Review* (ELRev). The overview is not meant to be exhaustive or complete, rather it serves to give a certain perspective and a sense of the scope of empirical research conducted in EU law in recent years. In keeping with the focus of the article, we discuss only those works that have invoked interviews as a data collection technique.

As far as monographs are concerned, in *Brokering Europe*, Antoine Vauchez, sociologist and political scientist by training, enunciates the early narrative of European integration by deploying 'a number of methodological moves and choices'.<sup>22</sup> His sources are manifold and have required years of work to uncover:

the very diverse set of oft-unexplored empirical research that this research has dug up over the years – bibliographical data, in-depth coverage of European law scholarly or professional conferences, ECJ cases' documents and commentaries, forgotten doctrinal controversies, interviews with key legal practitioners, archival files from the Commission's Legal Service and secretariat-general, commemorative material from the ECJ (eulogies, Festschriften, jubilees, etc.), among others'.<sup>23</sup>

Hans-W Micklitz has also used interviews for three case studies in *The Politics of Judicial Cooperation in the EU: Sunday Trading, Equal Treatment and Good Faith*. Through a qualitative approach, Micklitz attempted to 'reconstruct the three series of cases to the fullest extent possible, that is, in their national and European legal contexts and in their social-political contexts'.<sup>24</sup> For him, reconstruction

refers to more than a mere compilation of empirical data for a case study: in addition, it seeks to decipher the structure of meaning in the ongoing process

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<sup>22</sup> Antoine Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 6.

<sup>23</sup> Ibid 10–11.

<sup>24</sup> Hans-W Micklitz, *The Politics of Judicial Cooperation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press 2005) 39.



of argumentation which shapes a case. This type of legal-sociological analysis includes the interpretation of law, Directives, documents, interviews with parties concerned, and the results of discourse and bargaining processes in written or oral form.<sup>25</sup>

In *The Making of a European Constitution*, Michele Everson and Julia Eisner used both surveys and semi-structured interviews with judges and lawyers of the High Court of England and Wales in a bid, to shed light on the role of Member State lawyers in accepting the supremacy of EU law. They sent the survey to 166 lawyers and judges (receiving 44 replies) and conducted five semi-structured interviews. The survey and interviews were prepared to test the assumption that lawyers use 'a formalist legal idiom when narrating their experiences'.<sup>26</sup> Both direct questions and indicators were used. Whilst the former were used to test the main assumption, the indicators were developed to track more subtle changes in the language and instruments of legal argument, the changes in the use of non-legal and non-national material, as well as in the style of legal argumentation.

EU judges were also interviewed by the US scholar Ran Hirschl for his book *Towards Juristocracy*, which provides a comparative analysis of the role of judiciary in different jurisdictions.<sup>27</sup> Similarly, the book *The International Judge* was based on in-depth interviews of 32 judges between 2004 and 2006, among them representatives of the EU judiciary.<sup>28</sup> A range of highest court judges were also interviewed by Elaine Mak, who used interviews to conduct a comparative analysis of the changing practices of Western highest courts.<sup>29</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Michele Everson and Julia Eisner, *The Making of a European Constitution. Judges and Law Beyond Constitutive Power* (Routledge 2007) 98.

<sup>27</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

<sup>28</sup> Daniel Terries, Cesare P R Romano, and Leigh Swigart, *The International Judge. An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press 2007) xvi-xvii. For the research on EU courts undertaken by political scientists, see, among others, R Daniel Kelemen, 'Talking about the European Court: Discourses of Judging in the European Union' in Austin Sarat (ed), *Special Issue: The Discourse of Judging* (Studies in Law, Politics and Society, Volume 58 2012) 139–157.

<sup>29</sup> Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013).

Deirdre Curtin has engaged actively in research invoking empirical methods, and encouraged PhD students to do so as well.<sup>30</sup> Two recently concluded PhD theses under her supervision build on extensive interview material with policy-makers. Vigjilenca Abazi's thesis lists forty semi-structured interviews that 'provide information for this research on issue that arise in day-to-day EU practice and insight into what the EUCI regulatory regime looks like to participants, what mechanisms and customs it employs and why it takes the forms that it does'.<sup>31</sup> Maarten Hillebrandt's thesis builds, in addition to quantitative data, on 68 interviews with experts 'in and around the Council', used to 'identify the development of (anomalous) implementation practices and informal norms, as well as to determine the relevant (combinations of) institutional factors from which explanatory mechanisms could be derived'.<sup>32</sup> Unlike in the examples of Everson and Eisner described above, the purpose of the interviews used by Abazi and Hillebrandt would not seem to relate to testing a thesis; instead they are a way of identifying core issues and mapping the ground.

It is more difficult to find policy-area specific research utilising interviews. The study of the implementation of the EU Directive on Integrated Pollution Prevention and Control in EU environmental law is a rare exception. Bettina Lange's study, published in 2008, is remarkable for its methodological approach. In the tradition of legal empiricists, the book challenged the idea of law as the formal law in the books and detached from its social and political contexts. The empirical research sought to 'question theoretical assumptions about the nature of law in EU integration by examining what law is generated in practice during the implementation of the IPPC Directive'.<sup>33</sup> To understand the law in action, Lange's study used three

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<sup>30</sup> See, eg, Maarten Hillebrandt, Deirdre Curtin and Albert Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis' (2014) 20 *European Law Journal* 1.

<sup>31</sup> Vigjilenca Abazi, *Secrecy and Oversight in the European Union. The Law and Practice of Classified Information* (University of Amsterdam 2015) 25.

<sup>32</sup> Maarten Hillebrandt, *Living Transparency. The Development of Access to Documents in the Council of the EU and its Democratic Implications* (University of Amsterdam 2017) Section 5.3.3.

<sup>33</sup> Bettina Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge University Press 2008) 13.

qualitative case studies, each relying on semi-structured interviews with members of EU technical working groups and staff in national authorities. Qualitative data was also collected through analysis of background files.<sup>34</sup>

Despite these examples that we are aware of, interviews are still seldom used in EU legal research. This impression is strengthened by a basic search for the word 'interview' in three key EU legal journals (CMLRev, ELRev, and ELJ), which results in a limited number of hits between 1 January 2013 and now:<sup>35</sup>

	2013	2014	2015	2016	2017	Total
<b>CMLRev</b>	0	2	1	0	3	<b>6</b>
<b>ELRev</b>	2	1	2	0	0	<b>5</b>
<b>ELJ</b>	1(0)	2(1)	1	2	1	<b>7(5)</b>
						<b>18</b>

In the five-year period, the journals published altogether 1367 documents (CMLRev 746, ELRev 404 and ELJ 217).<sup>36</sup> In light of this, the modest figure of articles using interviews confirms our intuitive understanding that interviews are a rare sight in EU legal scholarship. The selected three journals are generalist journals that – with the exception of the ELJ, which adopts the 'law in context' approach – do not favour one method over the other<sup>37</sup> and

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<sup>34</sup> Ibid.

<sup>35</sup> The search was conducted by a research assistant using available databases in September 2017. The figures presented only include those articles that used an interview or interviews as part of their legal research. The search naturally also included the plural term 'interviews', therefore double hits on the same article that occurred between the plural and singular searches were only counted once.

<sup>36</sup> Note though that these figures include all documents, including editorials, book reviews. It would have been too time consuming to filter them out from the aggregate figures.

<sup>37</sup> While CMLRev serves as the main doctrinal outlet, ELJ claims to represent 'an authoritative new approach to the study of European Law, developed specifically to express and develop the study and understanding of European law in its social, cultural, political and economic context'. The ELRev describes itself as the 'principal English-language journal covering the law relating to European integration and the

thus are in principle open to articles using empirical methods. Two articles, both published in the ELJ, were placed in brackets because they did not invoke interviews as a data collection technique, but generally discussed methodology of EU legal scholarship, including in this context also interviews. The articles covered many different aspects of EU law scholarship, and no particular topic emerged more frequently in articles using interviews. The only weakly discernible pattern seems to concern judicial function, for three articles, all published in the CMLRev, dealt with judicial appointments, openness and the reform of the EU's court system. One common observation is that in at least four articles (one in both CMLRev and ELRev respectively and two in the ELJ), the authors referred to only a single interview.<sup>38</sup> This suggests that the authors did not use interviews systematically, but instead relied on them to acquire specific information they know exists on the matter they are investigating.

This admittedly superficial overview of research conducted using interviews in the area of EU law in the past ten years or so yields the following observations. First, the critical stance of empirical research is still noticeable, and works seem to be driven by a desire to describe and understand the law in action. What has, however, changed from the early days of EU socio-legal scholarship is that the research has gone beyond the gap. Most recent empirical works in the area of EU law, such as those of Abazi and Hillebrandt, do not necessarily start from the premise that the 'law in action' exists and operates in the shadow of the 'law in the books' and that the primary purpose of research is to reveal and measure that gap between formal and empirical law.

Our own respective research projects fit this characterisation well: they study the role of legal expertise in EU policy-making (Leino-Sandberg) and the normative, political and constitutional frameworks of lobbying (Korkea-aho). We usually answer questions of the interpretation of the law and its adaptation to the realities of society with the help of legal and non-legal sources. However, in the context of our current research ventures, which

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Council of Europe. While preserving the highest academic standards, the Review also caters for the needs of those involved in the practice and administration of the law'.

<sup>38</sup> The full list is available from authors on request.

focus on what lawyers think of and regard as law, such sources are nowhere to be consulted. There is no law, be that EU legislation or court rulings, that unambiguously guide the work of legal experts or lobbyists, suggesting that current empirically oriented EU socio-legal research operates with assumptions that are different from traditional socio-legal scholarship. The lack of traditional normative sources is a direct consequence of the research's attempt to probe and extend the limits of what we perceive as 'legal' (as in: relevant for an understanding of what the law is) in the first place. Instead, research projects, including ours, push the conceptual envelope, contesting, as the research proceeds, the conceptual identification on which formal and empirical law rests. The empirical data collected in such research projects will be important as a source of law.

Second, interview research in EU law differs from its predecessors and contemporaries in national settings in that it is much less concerned with the 'end-users' of legal services. Instead, EU empirical legal research engages with 'high' law and legal practice, those doing the 'job' of interpreting, enforcing and administering the law. Little attention is devoted to people, organisations or economic operators that are the objects of its application. For long, judges have occupied a pride of place in empirically oriented research on EU law conducted by scholars of both law and social sciences. A related observation is that EU empirical legal research is not, primarily at least, conducted to produce high-quality data to inform policy-makers. Unlike in national contexts, little to no discussion in EU empirical legal scholarship has focused on intended audiences for the results produced by empirical legal research.<sup>39</sup> Who will read the work? Other academics? Practitioners? Policy-makers? At the national or EU level or both? In the absence of a more specific definition of target audience, the assumption is that the audience is the same as in 'general' EU legal research.

Third, despite the current focus of scholarship being on high-level subjects of EU law, modern researchers – just like their predecessors – attempt to

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<sup>39</sup> As an exception see Lange who points out that the 'empirical data discussed in this book will be of interest to policy-makers seeking to understand the practical implementation of the IPPC Directive because the data illustrate a range of obstacles to the 'successful' implementation of the IPPC Directive in Member States'. See Lange (n 33) 17.

identify the emergence and development of implementation practices and informal norms, as well as to establish the relevant institutional factors affecting the performance of informal norms and practices. Research topics relate to the 'new' emphasis identified by Micklitz and van Gestel, concerning effectiveness, efficiency, impact and influence. The cited works do not conduct interviews to test specific hypotheses that they have identified prior to the project starting, nor do they seem interested in trying to disprove earlier work on the matter – something that for Micklitz and van Gestel constituted a point of criticism.<sup>40</sup>

With the exception of Everson and Eisner, none of the works cited above set a specific hypothesis to be tested through empirical work. However, the criticism of Micklitz and van Gestel of the rationales for conducting socio-legal research rests on unnecessarily limited premises: empirical research can also be used more directly to obtain information not otherwise available. Then its primary purpose is not to test the hypothesis (reform X results in changes Y and Z), but rather, as is in our respective projects, to develop an understanding, as the research proceeds, of how law functions and is represented within society.<sup>41</sup> In these instances, interviews or other quantitative or qualitative methods are used together with other data collection techniques. A selection of EU literature demonstrates that there are some on-going or recently completed research projects in the area of EU law (including ours) that focus on topics requiring information that is not simply available through a close reading of written sources.

### III. INTERVIEWING LAWYERS: EXPERT INTERVIEWS AS A METHOD

The debate on 'expert' interviews is part of a more general discussion on the methodology and methods of qualitative research. In Europe, the initial discussion was launched in 1991 by Michael Meuser and Ulrike Nagel, two German scholars.<sup>42</sup> The debate intensified and internationalised a decade

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<sup>40</sup> See also Baldwin and Davis (n 2) 891.

<sup>41</sup> A good example of such approach is Bettina Lange's work in (n 33).

<sup>42</sup> Michael Meuser and Ulrike Nagel, 'ExpertInneninterviews – vielfach erprobt, wenig bedacht. Ein Beitrag zur qualitativen Methodendiskussion' in Detlef Garz and Klaus Kraimer (eds), *Qualitativ-empirische Sozialforschung. Konzepte, Methoden, Analysen* (Westdeutscher Verlag 1991) 441–471.



later when methodology handbooks introduced chapters on expert interviews. In the US, similar methodological debate has occurred under the label 'elite' interviews,<sup>43</sup> while in Europe the term 'expert' is commonly used to avoid negative connotations of the word 'elite'.

Discussion on expert interviews rests on the conceptual difference that is made between an 'expert' and a 'lay person', expert knowledge versus every day or common-sense knowledge. What constitutes an expert? One way to identify an expert is to emphasise the esoteric nature of expertise: 'an individual is addressed as an expert because the researcher assumes –for whatever reason– that she or he has knowledge, which she or he may not necessarily possess alone, but which is not *accessible to anybody in the field of action under study*'.<sup>44</sup> The expert has acquired access to a specific body of information or gained skills and professional knowledge through rigorous learning and training:

Such superior knowledge is usually produced by designated process of learning and training ... Members of professions such as physicians, lawyers or architects are the best-known examples of 'trained' experts.<sup>45</sup>

However, specialised knowledge, the possession of which qualifies the interviewee as an expert does not have to be the outcome of formal training or education. Actors such as representatives of citizens' groups or non-governmental organisations (NGOs) can also be experts by virtue of their privileged access to information. The same information cannot easily be found on the internet or obtained from newspapers. To qualify as an expert, they must have acquired their knowledge of a particular issue through an activity which is aimed at analysing or helping to solve the problem in some way.<sup>46</sup> This criterion is highly subjective, unlike criteria relating to formal

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<sup>43</sup> See Jaber F Gubrium and James A Holstein (eds), *Handbook of Interview Research: Context and Methodology* (Sage Publications 2002) or Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (2nd edn, Sage Publications 2000).

<sup>44</sup> Michael Meuser and Ulrike Nagel, 'Experts and Changes in Knowledge Production' in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Interviewing Experts* (Palgrave Macmillan 2009) 18 (emphasis added).

<sup>45</sup> Jochen Gläser and Grit Laudel, 'On Interviewing "Good" and "Bad" Experts' in Bogner, Littig and Menz (n 44) 118.

<sup>46</sup> Meuser and Nagel (n 44) 24.

verifiable training or education. However, it is necessary to keep in mind that 'every expert is also to some degree the "construct" of a researcher's interest'.<sup>47</sup>

This finding highlights the existence of a subjective element in defining an 'expert', which also has the potential to affect the outcomes of research. One way of mitigating the researcher's influence on the choice of participants is the 'snowball' technique, which is used in selecting interviewees more generally, but works especially well in expert interviews where uncertainty exists on who should be included.<sup>48</sup> This is a technique that we have both used and found useful. Snowballing means that the researcher begins with an individual or a group of individuals who are already known to her and asks them to name someone else whom they think would be a good interviewee for the purposes of the study, and in that way gradually build up a larger sample of participants.<sup>49</sup> Snowballing serves also to ensure the representativeness of interview sampling. The repetitious mentioning of certain experts strongly indicates that the researcher has managed to find the representative sample for the purposes of the research project. In addition to snowballing, we have sampled our interviewees through the preliminary analysis of the field, by studying information available on the internet and by contacting former colleagues and acquaintances.

Snowballing emphasises an important aspect of expert interviews: an institutional background. Although the initial focus may be on the interviewee's personal capacities, the 'expert is not interviewed as an individual; the interview context is organisational or institutional'.<sup>50</sup> Contexts of expertise vary, but usually they comprise occupational tasks, science or institutions. The institution does not have to be governmental, and a non-governmental organisation is an example of an institution that

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<sup>47</sup> Alexander Bogner and Wolfgang Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction' in Bogner, Littig and Menz (n 44) 49.

<sup>48</sup> This particular technique also works in situations in which stigma is attached to the practice under investigations, such as lobbying.

<sup>49</sup> See also Webley (n 2) 934.

<sup>50</sup> Gabriele Abels and Maria Behrens, 'Interviewing Experts in Political Science: A Reflection on Gender and Policy Effects Based on Secondary Analysis' in Bogner, Littig and Menz (n 44) 140.

accumulates expertise.<sup>51</sup> As explained in detail below, this has important practical ramifications for access: it is often possible to extend the circles of interviewees either within the same organisation or institution or across institutional and organisational lines. This also means that the expert role is not only tied to the level of knowledge (the expert knows more than the average person or the researcher herself) but to the fact that they can either facilitate or control access to other people and institutions.<sup>52</sup> In other words, they act as gatekeepers.

The expert interview is not linked to the particular type of interview, but to the particular respondent,<sup>53</sup> and can include all forms of qualitative interviews that are conducted with experts.<sup>54</sup> Expert interviews are a challenging form of qualitative data gathering. Besides requiring interpersonal sensitivity and adaptability, the interviewer must be well-prepared and have sufficient, even detailed knowledge of the field in which the experts work. This is believed to generate trust and proximity, triggering the expert to respond in an open and non-defensive fashion.<sup>55</sup> In our research, as indicated above, expert interviews have also been used to map the ground; however, even then we have found that trust is difficult to gain, unless the interviewer can demonstrate adequate knowledge of the field that she is studying. However, sometimes naïve questions produce the most interesting answers: 'if the interviewee thinks she or he needs to explain the most basic elements of his or her ways of thinking and acting, this can be of great interest for analyses of interpretative knowledge because even simple patterns or argument that are not usually made explicit by the expert will be set out in detail'.<sup>56</sup>

Although the decision on research design is made in the beginning of the research process, choosing which particular technique works best must, however, often be made extemporaneously, sometimes even during the interview, depending on the interview situation and the type of expert

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<sup>51</sup> Gläser and Laudel (n 45) 118.

<sup>52</sup> See also Bill Gillham, *Research Interviewing: The Range of Techniques* (Open University Press 2005) 54.

<sup>53</sup> Similarly see Gläser and Laudel (n 45) 118.

<sup>54</sup> Ibid.

<sup>55</sup> Meuser and Nagel (n 44) 32.

<sup>56</sup> Bogner and Menz (n 47) 64.

interview. Indeterminacy leads to semi-structured interviews with open-ended questions, which are most often used in interviewing experts.<sup>57</sup> This is what we have also found valuable for interviews with experts. Interviewees often ask for some indication of the questions that will be asked prior to the interview in order to prepare. For this purpose, we sent an indicative list of the type of questions we would wish to discuss before the interview takes place. However, as the interviews advance, we often moved to cover other questions that either the researcher or the interviewee identified as relevant for the topic.

Expert interviews therefore lend themselves to very different types of research situations. One common situation identified above is 'exploratory expert interviews': interviews with experts are used to establish a preliminary understanding of a new or developing field, serving 'the researcher to develop a clearer idea of the problem or as a preliminary move in the identification of a final interview guide'.<sup>58</sup> Experts, in other words, offer background information and point to sources of further information, saving the researcher both valuable time and resources that would otherwise be devoted to data gathering processes. This model comes with a clear bias: the researcher might be tempted to rely too heavily on the sources identified by the interviewee, instead of mapping the ground herself.

The second way of using expert interviews is to conduct them with the aim of obtaining systematic and complete information: 'the expert is treated here primarily as a guide who possesses certain valid pieces of knowledge and information, as someone with a specific kind of specialized knowledge that is not available to the researcher'.<sup>59</sup> This variant, which is sometimes called the 'systematising expert interview', is most commonly used by those engaging in expert interviews.

The third alternative, the 'theory-generating interview', differs from the other two, because the expert is not the source (exploratory) or a tool through which the researcher gains useful information and organises it (systematising). In this kind of interview, the interviewer 'seeks to formulate

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<sup>57</sup> See Beth L Leech, 'Asking Questions: Techniques for Semistructured Interviews' (2002) 35 *PS: Political Science and Politics* 665.

<sup>58</sup> Bogner and Menz (n 47) 46.

<sup>59</sup> Bogner and Menz (n 47) 47.

a theoretically rich conceptualization of (implicit) stores of knowledge, conceptions of the world and routines, which the experts develop in their activities and which are constitutive for the functioning of social systems'.<sup>60</sup>

In the literature, several types of conversational interaction are reported. First, the 'paternalism effect' is manifested in the interviewee's condescending approach towards the interviewer and her research. Second, the 'catharsis effect' is used to describe the situation in which the interviewee uses the interview to express her feelings, including changing roles from expert to private individual. This effect is visible, for example, in the way in which respondents may report on private family events. Third, the 'iceberg effect' refers to an interviewee's unwillingness to, first, attend the interview and, secondly, to give information during the interview. Fourth, the 'feedback effect' means that the interviewee attempts to reverse roles with the interviewer, a common eventuation in situations where the topic is sensitive and conflict-laden. A typical example is the interviewee asking who else has been interviewed and commenting negatively on the questions and research in general. Finally, the 'profile effect' occurs where the interviewee uses the interview as a way to prove her capability and expertise and is eager to give information.<sup>61</sup> We have experience with all of these situations.

These interactive effects can be read to challenge the validity of interviews as a data collection technique. True, every interview is different, and sometimes securing access to good data depends on the charisma and personality of the interviewer or some other interpersonal factor affecting communication. However, the existence of interactions, or power asymmetry between the interviewer and the interviewee, do not as such dismiss the validity of interviewing as a method or suggest that interviewing is random as a method. Expertise is interactional and situational, and the expert is defined as part of the context within which expertise is assessed. This requires critical self-reflection from the researcher, who must reflect on and justify the choices and decisions made during the research process, taking into account her own role as an interviewer and expert. Interview sampling – where the interviewer must select interviewees who are likely to yield the most information and have the greatest impact on the development of knowledge – is a critical part

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<sup>60</sup> Ibid 48.

<sup>61</sup> Abels and Behrens (n 50) 144–150.

of the research process. Despite the case-by-case nature of interviewee selection, it is not random.

From the perspective of a legal scholar, the discussion about expert interviews has so far remained on a general level and has not addressed the issue of interviews with lawyers or lawyers as experts. Nor does the literature mentioned above in section II include discussions of problems, setbacks or challenges during the implementation of research interviews. There is, to give an example, very little discussion of the problems faced by researchers interviewing judges. The little discussion we have managed to find on interviewing and talking to lawyers is by US scholars and mostly concerned with research on the legal profession as such.<sup>62</sup>

One might argue that there are no reasons to think that lawyers are different from other experts, and what is said of expert interviews generally applies to lawyers in particular. This is true, and the themes discussed below have been reported in the literature on 'general' expert interviews. In our experience, however, interviews with lawyers pose particular challenges, which have been ignored and overlooked in general discussions on expert interviews. These challenges relate to access, confidentiality and control of the research process and data.

We do not claim that these lawyer-specific challenges emerge only in interviews with those who work as lawyers or who have a legal background. It is certainly true that non-lawyer interviewees may also try to control the research data or require specific confidentiality assurances. However, in our experience, which involves both lawyer and non-lawyer interviews, the three above-mentioned challenges occur more often in lawyer interviews than in those conducted with non-lawyers. Our interview data does not give conclusive answers as to why these challenges seem to specifically relate to interviews with lawyers.

Does our own role as lawyers have something to do with it? As shown below, our own educational and professional backgrounds indeed play a role. As

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<sup>62</sup> David B Wilkins, 'The Professional Responsibility of Professional Schools to Study and Teach About the Profession' (1999) 49 *Journal of Legal Education* 88; Susan Saab Fortney, 'Taking Empirical Research Seriously' (2009) 22 *The Georgetown Journal of Legal Ethics* 1473.



every profession, the legal profession also 'has its own technical language, a private terminology which can only be fully understood by the members of the profession', which both creates and affirms membership.<sup>63</sup> External assessment of professional competence is carried out by other members of the same profession, which leads 'professionals to have a powerful motive to be far more concerned with the way they are viewed by their colleagues than with the way they are viewed by their clients'.<sup>64</sup>

We believe that our own role as lawyers, and proficiency in the legal technical language spoken by the profession, for instance, conditions access in the sense that common background (lawyer interviewer – lawyer interviewee) makes it easier to ensure an interview with lawyers (see more in section IV.1. 'Access' below). Does the non-lawyer face more challenges in accessing lawyer interviewees? We do not know, but we suspect this to be the case. Most professions, including the legal profession, see themselves as 'an elect group by virtue of hard work and mastery of the mysteries of the profession'; professional training leads to a belief of being 'a special kind of person, both different from and somewhat better than those nonprofessional members of the social order. It is equally hard for the other members of society not to hold an analogous view of the professionals'.<sup>65</sup> Our claim is – although we are currently unable to verify it – that also non-lawyer interviewers notice these challenges as lawyer-specific, and in this respect, they are not wholly dependent on the interviewer being a lawyer herself.

#### IV. ACCESS, CONFIDENTIALITY AND CONTROL OF RESEARCH DATA: INSIGHTS FROM THE RESEARCHER'S REALITY

##### *1. Access*

Access refers to the preliminary stage in a research process where the researcher tries to get experts to agree to an interview. In general, it is considered easier to convince experts to agree to an interview than members of the general public since the former have a professional interest in their own

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<sup>63</sup> Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 Human Rights 17.

<sup>64</sup> Ibid 17.

<sup>65</sup> Ibid 18.

field and tend to be more open towards research.<sup>66</sup> Furthermore, those with experience of expert interviews often find that 'getting the interviewee to speak' usually does not constitute an obstacle, because experts are well-versed in reflecting on their work and the positions they adopt and defending those ideas to a critical audience.<sup>67</sup> Engaging in critical debate also constitutes a part of research training, which many experts have if they have gained a doctorate or a specialised masters' degree. We have experiences of experts who heard about our research from their colleagues or through other connections and subsequently volunteered to be interviewed. Many of these respondents have an academic background and therefore a personal interest in contributing to research. They may also consider academic discourse an additional channel for influence.

Access also has another side. Besides securing physical access to an institution or an expert, access can become an issue in the interview situation if the interviewee refuses to openly respond when confronted with certain questions. We have found especially with lawyers that they tend to repeat the same thing, institutionalising the truth as it were. We have attempted to pierce the veil and counter this by engaging in similar behaviour. In such instances where the interviewee mechanically repeated, for example, the information that can be accessed on the institution's website, we, in turn, asked the same question repeatedly, but phrasing it differently each time. Usually, the third time was the charm.

Difficulties in access may also arise from a choice of words. Especially in research relating to lobbying, the choice of correct and appropriate terminology has proven crucial, as words involving negative connotations feed into negative interview perceptions. For this reason, in Korkea-aho's research, preliminary communication with potential interviewees has steered clear of certain expressions such as 'lobbying' or 'lobbyist'.

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<sup>66</sup> Baldwin and Davis (n 2) 893. See, however, Aberbach and Rockmann in whose view, the fact that expert are often 'busy officials who are widely sought after' creates a major problem facing those wanting to interview experts. See Joel D Aberbach and Bert A Rockman, 'Conducting and Coding Elite Interviews' (2002) 35 PS: Political Science and Politics 673.

<sup>67</sup> Bogner and Menz (n 47) 71.

Our experience with lawyers is mixed and emphasises the role that the institution employing the expert plays in the availability of experts. What makes the lawyers forming the focus of our research (often working in the public sector) more available than other types of experts, is the fact that civil servants – depending on their employer – often have a duty to be approachable and available for researchers. However, we also have experienced the 'iceberg effect', even though most of the civil servants we have approached have either given the interview themselves or provided the contact information of a colleague available to interview. Institutional policies may differ in this regard – some institutions direct researchers to communication units and, instead of answering questions, provide materials intended for communicating institutional policies to the general public. However, and given that experts are interviewed in the institutional context, we have encountered situations where lawyers have declined the invitation to share their information on the grounds that they consider that participation would bring about undesirable consequences and negative publicity on their institution.<sup>68</sup> Lawyers working in and around non-governmental organisations, trade unions, and so on, have agreed to be interviewed nearly without exception. Difficulties in access have primarily been found in situations involving certain public-sector actors and lawyers in the private sector, especially those working in law firms.

A shared background may facilitate access to experts, and can increase the expert's motivation and willingness to participate. Such background can be a common scientific context, nationality, education or professional status. The researcher's specialist interest in the subject and her own expertise have a role to play as well.<sup>69</sup> In our experience, a similar educational pedigree and common colleagues makes it significantly easier to access experts. Nevertheless, an emphasis on shared background is not simply either good or bad. On the one hand, a common reference system ('common language') makes access easier and assists in gaining the confidence of your interviewees: you are both aware of the existence of certain ethical and professional norms, which many of our interviewees have also actively referred to. It therefore injects trust into the system, but it may also result in a number of 'between

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<sup>68</sup> Wilkins (n 62) 91 and Saab Fortney (n 62) 1477.

<sup>69</sup> Bogner and Menz (n 47) 59.

the two of us, and I do not wish to be quoted on this'-type of comments. These kinds of results may assist in illuminating the research object, but will provide difficulties in determining the extent to which they can be used as a source. Overemphasis on shared values and experiences may also result in the feedback effect: the interviewee tries to turn the context 'upside down' and make the interviewer a co-expert, compromising her possibility to ask questions and analyse data.<sup>70</sup> Shared personal history obviously adds a different dimension to the interview, through, for example, sharing personal news, and produces elements that we have requested our research assistant in charge of preparing the transcripts to exclude.<sup>71</sup> These might count as 'interaction effects' described in literature, which refer to 'whatever endangers the interaction structure being striven for and the distortions of and deviations from the ideal kind of interview that is sought after'.<sup>72</sup>

Unlike other features of lawyer interviews (confidentiality and the control of research data), shared background is not simply a characteristic of lawyers as interviewees, but it is a characteristic of the specific interview situation where both the interviewer and the interviewee are lawyers, and thus speak the same language of the legal profession. In this way, shared background in the form of the same educational pedigree and similar professional career paths plays a role. Of course, general educational background is also important, and a higher education degree may make experts, including lawyers, more willing to contribute to and participate in research than those who do not have doctoral degree.

As far as our projects are concerned, shared professional background has been more a positive than a negative element. It has assisted in our gaining access to first-rank experts and also created and sustained a snowball effect: previous colleagues have actively sought new interviewees, simultaneously recommending the researcher and the credibility of her objectives. This might of course create a sense of loyalty obligations for the researcher. Shared background has also in many cases translated into interviews becoming semi-

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<sup>70</sup> Abels and Behrens (n 50) 148.

<sup>71</sup> Expert interviews are not always transcribed in verbatim before the analysis. For discussion of transcription practices in expert interviews, see Meuser and Nagel (n 44) 35.

<sup>72</sup> Bogner and Menz (n 47) 56.

structured. Discussion has begun from shared experiences, and then moved to discuss matters that, in the interviewee's view, would be of most relevance for the research project.

In short, we as legal scholars might not be masters at deploying techniques but 'creativity lies in marrying some aspects of the insider's legal knowledge with the sociologist's ability to discern the wider themes underlying the individual dramas of the law'.<sup>73</sup> Such dramas become particularly visible in situations where the interviewee has seen the interview as a way to prove her expertise and – often as a consequence of snowball effect – insists on being interviewed as a part of the project, and subsequently volunteers to give information, often of a confidential nature (the 'between the two of us' situation described above).

## *2. Confidentiality*

All experts are not equally accessible. In Littig's view, 'the higher the social class, the more difficult access becomes'.<sup>74</sup> Her view, and we agree here, is that the difficulty of access is related to the fact that often people in higher positions handle confidential material. Lawyers, especially those in private practice, may be unwilling to disclose information to researchers due to client or firm confidentiality concerns. Participation in research could potentially lead lawyers to breach their duties to keep confidential information that relates to the firm or its clients.<sup>75</sup> Our research is more related to experts that work in the context of adopting either legislation or public policy.

Researchers are usually well aware of the significance of confidentiality for undertaking empirical research. In literature, confidentiality discourse has been categorised into four groups: 1) concerns relating to protection from 'harm'; 2) concerns relating to 'privacy'; 3) concerns relating to the accuracy or integrity of research; or 4) concerns relating to ethical standards.<sup>76</sup> The

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<sup>73</sup> Baldwin and Davis (n 2) 890.

<sup>74</sup> Beate Littig, 'Interviewing the Elite' in Bogner, Littig and Menz (n 44) 104.

<sup>75</sup> Wilkins (n 62) 91.

<sup>76</sup> Benjamin Baez, 'Confidentiality in qualitative research: reflections on secrets, power and agency' (2002) 2 *Qualitative Research* 41. The discussion excludes cases where the interviewee may reveal criminal conduct.

first two relate to the interviewee and the other two primarily concern the researcher herself.

From the perspective of the lawyer respondent, protection from 'harm' and privacy are important. For them, harm would be lost reputation, other types of professional stigma or some economic effect that has resulted from the statements made during the interview. Privacy is less of a personal concern, but matters primarily at the level of the institution. It is not difficult to imagine that the lawyer working for one of the EU institutions is keen to ensure that her identity is not exposed within or outside the institution when the researcher reports her research results, especially if the interview is critically-oriented and brings to light matters that will be negatively assessed. To guarantee a broad basis for analysis, we have adopted the practice of interviewing several experts from the same institution. When properly anonymised, it should not be easy to identify individual respondents' positions. Data protection rules and nationality also play roles – in some EU Member States, only the highest officials are identified by name in public, while in other Member States the names of staff working in the public sector are generally public information. According to the current reading of EU data protection rules applied by the EU institutions, the publication of names is generally understood to require data subject's consent.<sup>77</sup>

For the researcher, confidentiality is premised on the tension between the two potentially conflicting demands (points 3 and 4 above): the need to protect respondents, on the one hand, and accurately report data, on the other.<sup>78</sup> The difficulty is that the value of data is often tied to the position and experience of the person being interviewed; therefore, providing full anonymity reduces the value of the gathered data. How is it possible to balance the conflicting demands in a manner that respects the respondent's

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<sup>77</sup> Case T-309/97 *Bavarian Lager v Commission* EU:T:1999:257. For a discussion, see Päivi Leino 'Just a Little Sunshine in the Rain: The 2010 case law of the European Court of Justice on Access to Documents' (2011) 48 *Common Market Law Review* 1215; Deirdre Curtin and Päivi Leino, 'Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis' (2016) Robert Schuman Centre for Advanced Studies Research Paper 63/2016 <<http://cadmus.eui.eu/handle/1814/44204>> accessed 6 October 2017.

<sup>78</sup> Baez (n 76) 36.



right to privacy and complies with ethical standards, but ensures that information gleaned from interviews is accurately reported?<sup>79</sup>

In Leino-Sandberg's research projects, the interviewees signed consent forms and simultaneously agreed to how they wish to be identified for the purposes of reporting the results. The interviewees chose between being identified by name, partial anonymity (position and institution but without name or nationality) and full anonymity, in which case only the institution for which the expert is working is disclosed. Most interviewees opted for the middle position, which, for the purposes of our research, has been satisfactory. While nationality would often offer additional avenues for analysis, especially in smaller units or institutions, it would effectively disclose the identity of the interviewee, which many feel uncomfortable with. In Korkea-aho's project, no consent form was used. The starting point was that interviews were fully anonymised, and information on the identity of the interviewee (including the institution or background organisation) was not made publicly available at any stage of the research process. Instead of a consent form, the researcher explained privacy and anonymity practices in the correspondence prior to interviews. The same information was repeated in the beginning of the interview situation.

In our preliminary attempts to obtain access to practising lawyers in the private sector, anonymity seems to be an insufficient guarantee to put lawyers at ease, especially when the information sought is potentially confidential. Much depends on the topic and, if the issue is highly sensitive, the researcher may be required to adjust her research design to obtain the information she is after. We have, for instance, used a multi-question survey targeting the institutional representatives as a preliminary step to create the necessary trust to continue with interviews. What has emerged in preliminary discussions with lawyers in private practice is not a need to protect client confidences. The greatest hindrance to interviews seems to be the fear that the respondents will somehow be identified within the profession, suggesting

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<sup>79</sup> This is a policy that we have committed to in the data management plan required by our funder, the Academy of Finland, including provisions on ethical issues that concern data collection and research implementation.

that it is perhaps privacy and professional reputation, and not client confidentiality, that must be carefully considered.

Accuracy in reporting the results of research can be greatly improved by recording the interviews. In our experience, some lawyers – in particular lawyers working for the European Commission – have proved sensitive to recording the interview, even where the interviewee has been assured of full anonymity. From the interviewer's point of view, recording is in practice the only way to ensure the accuracy of transcripts, even though the interviewee would not be directly quoted. However, in some cases we have taken notes where recording would have effectively prevented the interview from taking place at all.

The tension between research ethics and rigorous research capacity is not the only factor to consider. An important issue that frequently surfaces in the researcher's deliberations concerns the potential consequences of a certain course of action. Especially in expert interviews, where experts are not only knowledgeable but also in the position to control or facilitate access, the researcher is always concerned with the continuation of the project. If she reports the data accurately, will she again be able to gain access, for the purpose of further interviews, to the same institution or even to other institutions?

### *3. Control of Research Process and Data*

The final issue is control of the research process and data, by which we mean the interviewee's attempts to manage either the interview situation or the interpretation of the data. In research literature, the interview has been described as an instance of negotiating and enacting power relations.<sup>80</sup> In some interview situations, the interviewee may pose counter-questions, provide strategic comments or ask for the interviewer's own view of a problem. Another common issue in our experience is that the interviewee insists on knowing who the other interviewees are, irrespective of the fact that she agreed to participate on the condition that participants' identities are not revealed in any of the outputs of the projects.

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<sup>80</sup> Sonja Kosunen and Jaakko Kauko, 'Valtasuhteet tutkimushaastattelussa' (2016) 58 *Politiikka* 27.

Control of research data has its most problematic manifestations after the interview has been conducted and the researcher proceeds to analyse and interpret the data. We have experiences from an interview situation with a group of individuals who all worked in the same institution. The interview was not tape-recorded, as the interviewees specifically requested the interviewer not to do so. Instead, notes were taken by hand. After the interview, the interviewees requested copies of the handwritten notes, a request that was agreed to. The notes were immediately typed-up after the interview and subsequently emailed to the interviewees. After three days, the notes were returned in a heavily edited form. Even the word-for-word transcripts were modified with remarks on the margins: 'this cannot be used', 'this was not said', and so on, with the result that two versions of the interview notes now exist, authorised and non-authorised. To ensure access to the institution in the future, the choice was made to use the authorised versions of the notes.

In situations where the interviewee refuses to cooperate, and the interviewer cannot resolve the conflict, a decision can be made to replace the non-cooperative interviewee. Change of an interviewee should not, however, be the primary way to manage conflicts in interviews. Expertise is considered a type of luxury good, in the sense that an expert is not easily replaced. The researcher may also end up in a situation where the 'gatekeeper expert' prevents the researcher from securing interviews with other experts in the institution. Selection also always influences the validity and credibility of findings.

Expert interviewees usually require pre-publication review rights, which extends the interviewee's influence to the research reporting stage. To allow the interviewees to review the information attributed to them before an article is published is a common practice (these rights were granted to the interviewees in the above example).<sup>81</sup> However, the manner in which this operates in practice is not always clear. This joint decision-making of course restricts the freedom to conduct a research process, but it can in certain circumstances be recommended, as it may be the only way to get people to agree to an interview. Furthermore, the joint-decision making mechanism can be expected to make respondents less cautious and more helpful. In our

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<sup>81</sup> Gillham (n 52) 55.

experience, this mechanism should not be considered a problem, as the aim of empirical research is not to expose people or bring negative publicity on individuals, who in any case usually remain anonymous unless they have specifically requested the opposite. However, in most cases, the exercise of the pre-publication review rights does not impose unreasonable demands on the researcher's integrity and freedom to report research results. So far, we have no experience of situations where interviewees have objected to the publication of the data at this stage.

## V. CONCLUSIONS

In this piece, we have reflected on our own experiences *vis-à-vis* the literature on expert interviews. It appears, broadly speaking at least, that our experiences with lawyer interviews follow those reported in methodology literature, but certain significant differences also emerged.

As regards access, shared background and fluency in the same professional language seem to play a larger than usual role with experts. However, shared background mostly works as a bonus, not only in terms of access but also in terms of the actual interview situation. Works on expert interviews report on the continuous need on the part of the researcher to verify that 'she knows what she's talking about'. We have not encountered this and in our view similar educational background may be an explanatory factor.

Confidentiality is not a particular issue for expert interviews more generally, and confidentiality has primarily been discussed in the context of interviews targeting 'vulnerable groups' such as patients, drug-users, or children.<sup>82</sup> However, confidentiality has a pronounced role when research subjects are lawyers, irrespective of their actual occupation. Lawyers are conscious of the confidentiality obligations they may have. In most cases, methods, ranging from anonymity to pre-publication rights, seem sufficient to protect the confidentiality of lawyer respondents. Practicing lawyers have, at least initially, proven slightly more inaccessible. Unlike civil servants, they are also used to being paid for their time, which is something that academic research is unable to provide, and which might in any case risk the objectivity of the results. As long as research remains unconnected from an individual pending

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<sup>82</sup> Baez (n 76) 37.

file that the private sector lawyer is working on, she might see little reason to contribute to research ventures for the mere academic or societal benefit.

In our experience, lawyers are more inclined than others to require an active role in interviews and in editing the results. Early engagement and consultation of lawyers is also recommended in literature to secure participation and avoid potential confidentiality concerns,<sup>83</sup> even at the cost of compromising methodological integrity:

Methodological experts caution researchers to guard against various types of bias. To avoid bias, a researcher may approach research subjects, maintaining a distant stance. Unlike some fields in which social scientists may seek to maintain objective distance from research subjects, researchers studying the legal profession generally recognize the importance of communicating with practitioners and various stakeholders.<sup>84</sup>

This may serve as a way of getting lawyers used to interviews but also demonstrates some of the dilemmas involved in balancing the interests of gaining access to expertise with the need to maintain objectivity.

The question that remains unanswered is whether interviewing lawyers is worthwhile. In our experience, the answer is positive. We find that the method has assisted us in reaching the research objectives aimed at. We have been able to both cover the ground in greater detail and depth than we would have managed to do without these interviews, in that they have identified normative sources – both legal and non-legal – necessary to further our research. This is largely due to respondents providing topical information, as well as inside information, that we would have had significant trouble gaining access to otherwise. But we have also gained access to valuable expert opinions that we will use as sources in their own right, some of them as direct quotations to illuminate how the expert thinks and how she understands her work and its influence. This is information that could not be accessed in any other way.

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<sup>83</sup> Saab Fortney (n 62) 1478.

<sup>84</sup> Ibid 1477. Also Hillyard argues that the 'crucial characteristic of the researchers [in social science] is that they are trained to reflect on the extent to which their insider/outsider position affects their understanding of the phenomenon under study'. See Hillyard (n 2) 275.